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In the Supreme Court of the United States

OCTOBER TERM, 1945

No. 978

LESLIE G. BOWEN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the circuit court of appeals (R. 607–618) has not yet been reported.

JURISDICTION

The judgment of the circuit court of appeals was entered February 21, 1946 (R. 618–619). The petition for a writ of certiorari was filed March 21, 1946. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rules XI and XIII of the Crimi-

nal Appeals Rules promulgated by this Court May 7, 1934.

QUESTION PRESENTED

Whether the trial court erred in giving a supplemental instruction to the jury urging agreement after the foreman had volunteered, by written message, the unsolicited information that the jury was deadlocked 11 to 1.

STATEMENT

An indictment in thirteen counts was returned against petitioner and two others charging them with violations of the fraud (Sec. 17 (a)) and registration (Sec. 5 (a)) provisions of the Securities Act of 1933, 48 Stat. 77, 84 (15 U. S. C. 77q and 77e), and of the mail fraud statute (Crim. Code, § 215, 18 U. S. C. 338) (R. 1–53). Petitioner was found guilty on all counts (R. 59–60), and he was sentenced to imprisonment for a period of three years on each, the sentences to run concurrently (R. 61–62). His codefendants were acquitted (R. 59–60). On appeal to the Circuit Court of Appeals for the Eighth Circuit, the conviction was affirmed (R. 618).

The case for the Government showed without dispute that some time about 1931 or 1932 petitioner interested certain persons in financing a plan to manufacture and sell several devices he had developed, including a motorless washing machine, a two-speed bicycle sprocket, a speed reducer, a pedal boat, and a refrigerator (R. 124,

125, 129, 139–140, 148, 155–156, 194, 210, 216, 221, 223, 231, 238, 255–256, 260, 262, 263–264, 376, 387). In 1935 petitioner opened a shop in Chicago to make some of these devices (R. 349–351, 478–479). The project began as an unincorporated association called Bowen Industries and was financed by the sale by the several defendants and others of "pre-organization certificates" at $100 each (R. 124, 155, 158–159, 209, 268). In April 1942, the enterprise was incorporated as Bowen Industries, Inc., and in 1943 stock was issued in exchange for the pre-organization certificates (R. 487, 566–567). Thereafter the company was financed by issuing notes to various stockholders (R. 133, 137, 152–153). According to the company records, $193,720 was obtained from the sale of the pre-organization certificates and $45,168.46 from the issuance of the promissory notes (R. 115).

It was not disputed that petitioner was the organizer of the project and at all times controlled its activities (R. 126, 253–255, 277, 367, 383, 510, 513, 535–536). He was president of the corporation and a majority stockholder (R. 124–128, 131, 132, 211, 393). The project was a failure.

As the court below pointed out (R. 611–612), the main issue at the trial was whether petitioner's "project was conceived and was executed by him and his co-defendants in good faith and without intent to defraud purchasers of the securities, or whether it was a scheme to defraud and

to obtain money by false and fraudulent representations and promises." However, since the sufficiency of the evidence is not challenged and petitioner expressly concedes that "there was substantial evidence on the part of the government that many of the alleged misrepresentations laid in the indictment, and also others, were in fact made and that large sums of money obtained by the petitioner and his associates were unaccounted for" (Pet. 5), we deem it unnecessary to set forth the evidence in this regard. And, as exhaustively presented and analyzed in the opinion of the court below (R. 612–615), the records of the company in evidence tended to show "that Bowen and his co-defendants did not keep adequate books and records and that it was impossible to determine from such files and records as they kept whether the funds furnished by investors were properly or improperly expended" (R. 614).

The sole issue raised by the petition concerns the propriety of the supplemental instruction given by the trial judge when, after the jury had deliberated for approximately 12 hours (R. 586, 587–588, 590), the foreman of the jury sent a written communication to the judge (R. 591) which read, "This jury is deadlocked on a 11 to 1 verdict. F. B. Alderson, Foreman" (R. 595). After receiving this note, the judge called the jury into the courtroom and stated that he assumed they had not reached a verdict, to which the foreman replied in the affirmative (R. 590–591,

603). The trial judge then gave the jury the so-called "Allen instruction," urging the jury if possible to reach a verdict (R. 591–593).[1] Petitioner excepted to this supplemental charge and moved that the jury be discharged on the ground that it was coercive and an invitation to render a verdict of guilty (R. 593). At no time did the judge inquire or solicit information as to how the jury was divided numerically, nor at any time did he inquire nor was he informed as to the issues upon which they were deadlocked, as to which defendants the deadlock concerned, or as to whether the jury's numerical division was preponderantly for a verdict of guilty or of acquittal.

[1] The full text of this instruction follows:

"Gentlemen, you understand that it is desirable that you agree upon a verdict. You have put in a long hard day of work; you may be tired; you may have the short-comings that I have when I get tired; sometimes I am not open-minded, putting it mildly, as I am on other occasions. It would probably be a good thing for you to go home and quit your deliberations and be back in the morning refreshed. The trial has been rather long and it has been a rather expensive trial. The failure to agree upon a verdict will necessitate another trial, equally expensive. It seems to me that the case cannot be again tried more exhaustively than it has been on each side. It is therefore very desirable that you agree upon a verdict. I do not desire that any man shall surrender his conscientious convictions. On the other hand, each juror should perform his duty conscientiously and honestly, according to the law and the evidence. And, although the verdict to which a juror must agree must be his own verdict, the result of his own convictions, and not a mere acquiescence in the conclusion of his fellows, yet in order to bring twelve men to a unanimous result, you must examine

ARGUMENT

Petitioner concedes the propriety of the so-called "Allen instruction" standing alone (Pet. 17). See *Allen* v. *United States,* 164 U. S. 492;

the question submitted to you with candor, and with a proper regard and deference to the opinions of each other. You should consider that the case must at sometime be decided, that you are a jury selected in the same manner and from the same source from which any future jury must be, and there is no reason to suppose that the case will ever be submitted to twelve men more intelligent, more impartial, or more competent to decide it, or that more or clearer evidence will be produced on one side or the other.

"In the present case the burden of proof is upon the United States to establish its case beyond a reasonable doubt, and if, upon any count of the indictment submitted to you, you have a reasonable doubt, based upon the evidence, of the guilt of the defendant, you ought to acquit on that count, but in conferring together you ought to take proper respect to each others opinions, with a disposition to be convinced by such others [sic] arguments, and, on the other hand, if much the larger part of your panel are for conviction, a dissenting juror should consider whether a doubt in his own mind is a reasonable one, which makes no impression upon the minds of so many men, equally honest, equally intelligent with himself, who have heard the same evidence, with the same intention, with an equal desire to arrive at the truth, and under the sanction of the same oath. And, on the other hand, if a majority are for acquittal, the minority ought seriously to ask themselves whether they may not reasonably, and ought not to doubt the correctness of a judgment which is not concurred in by most of those with whom they are associated, and distrust the weight or sufficiency of that evidence which fails to carry conviction to the minds of their fellows. In order to acquit the defendant of the charges submitted to you, thirteen in number, you must consider all of them, and find that he is not guilty of any of them. On the other hand, if you find he is guilty of any of them, you should return a verdict of guilty, and when I say 'he' I am speaking in the collective sense in referring to all the defendants.

United States v. *Allis,* 73 Fed. 165, 182 (E. D. Kan. 1893), affirmed, 155 U. S. 117. He urges, however, that the fact that the jury had volunteered to the court, although privately, information as to their numerical division, tended to make this instruction coercive of a verdict of guilty. Petitioner further argues that the effect of this circumstance brings the situation within the proscription of *Burton* v. *United States,* 196 U. S. 283, 307–308, and *Brasfield* v. *United States,* 272 U. S. 448. (Pet. 16–24.)

The *Burton* and *Brasfield* cases involved the giving of the "Allen instruction" after *inquiry* by the trial judge as to the numerical division of a deadlocked jury.[2] There is no question that these cases hold it to be reversible error for a trial judge to give the instruction after having *publicly inquired* in open court as to the numerical division of a deadlocked jury. However, it

"You may conduct your deliberations as you cho[o]se, but I suggest that you now retire, in the morning after resting this evening, and carefully consider again the evidence relating to a few counts, for instance, one or the other of the groups as I have grouped them in my charge to you.

"I think, gentlemen, you fully understand the spirit in which I have said what I have just said to you. I need not elaborate on it further, but I will ask you to return in the morning at such time as may be determined among yourselves, for the reasons that I have stated. You may be excused, Gentlemen."

[2] While it does not appear from the *Brasfield* opinion that the inquiry was followed by a supplemental instruction, the record in that case (No. 243, Oct. T. 1926, pp. 106–107) shows that an instruction in substance the same as that in the *Allen* case was given by the trial judge.

is clear that the decisions of this Court in those cases turn on the potentially coercive effect of the public inquiry by the court as to the numerical division of the jury and the potential pressure from the required public disclosure as to how the jury stands numerically. The crux of the holding in the *Brasfield* case is the statement that:

> We deem it essential to the fair and impartial conduct of the trial, that the inquiry itself should be regarded as ground for reversal. * * * (272 U. S. at 450.)

Under similar circumstances of public inquiry by the trial court, the Circuit Court of Appeals for the Fifth Circuit in *Kesley* v. *United States,* 47 F. 2d 453, 454, stated:

> Because of the imputation of stubbornness, or worse, which is likely to arise if the numerical division of the jury is publicly revealed, to require disclosure of it is held error *per se* in the courts of the United States.

It seems clear, therefore, that the mischief lies in the public inquiry and the required public disclosure by the jury and not in the mere fact that the trial judge knows how the jury is numerically divided. Indeed, it is unrealistic to assume that the mere knowledge of the trial judge of the numerical division makes the otherwise appropriate "Allen instruction" coercive, since an experienced trial judge would normally assume from the fact that the jury reports a deadlock that a

majority stands one way and a minority another, and the jury, unless exceedingly naive, undoubtedly would realize that the judge operates on that assumption. Yet, it is well established that giving the "Allen instruction" after the jury reports it is hopelessly divided, deadlocked, or even that a majority favors one side, is not so coercive as to lay the foundation for reversal. *United States* v. *Olweiss,* 138 F. 2d 798, 800 (C. C. A. 2), certiorari denied, 321 U. S. 744; *Weathers* v. *United States,* 126 F. 2d 118, 119 (C. C. A. 5), certiorari denied, 316 U. S. 681; *Culp* v. *United States,* 131 F. 2d 93, 101 (C. C. A. 8); *Lucas* v. *United States,* 275 Fed. 405, 407 (C. C. A. 8), certiorari denied, 258 U. S. 620. Where, therefore, a public probing for information as to the jury's numerical division is absent, the logic of the *Brasfield* case is inapplicable and the situation is within the established rule of the *Allen* case.

It is unnecessary here, however, to speculate as to whether the giving of the supplemental instruction after the jury had volunteered in writing the proportion of their numerical division might have been coercive. The facts speak otherwise. When the jury finally retired after the trial judge had given the "Allen instruction," it had under consideration the guilt or innocence of three persons. The jury was excused for the night and did not resume its deliberations until the following morning, and at that time deliberated for more than an hour before returning a

verdict (R. 592–593, 604). And that verdict acquitted two of the defendants and found only petitioner guilty. If the circumstances were coercive of a verdict of guilty, as petitioner contends, one would reasonably have expected not only that the jury would have returned a verdict much more quickly than it did (see *Weathers* v. *United States, supra*), but also that it would have convicted all the defendants.

CONCLUSION

The decision below is correct and the case does not involve any real conflict of decisions. We therefore respectfully submit that the petition for a writ of certiorari should be denied.

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APRIL 1946.

U. S. GOVERNMENT PRINTING OFFICE: 1946